As the accused chose to remain silent after the close of the prosecution's case, the failure to allow him to repeat his allegations in the presence of the jury has deprived him of a fair trial. A cautioned statement such as that produced in the instant appeal may sometimes be the mainstay of the case for the prosecution, and the opportunity to repeat his allegations to the jury before the close of the prosecution's case is the proper and indeed the fairest way of enabling the latter, as sole judge of fact, to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by s 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution. Consequently, we consider that a conviction so arrived could not stand. Therefore, we allowed the appeal, set aside the conviction, quashed the sentence and ordered a retrial.

If this procedure is considered to be tedious, inconvenient and time-consuming the proper remedy would be for the legislature to amend the law.

Appeal allowed.

Solicitors: *Yusof Lee Pathma & Marbeck.*

Reported by *Prof Ahmad Ibrahim*

Creative Furnishing Sdn Bhd v Wong Koi

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 82 OF 1988.
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
9 JANUARY AND 15 MARCH 1989

Civil Procedure – Mareva injunction – Discretion of court – Whether properly exercised – Whether plaintiff has established a good arguable case against defendant and that defendant has assets within jurisdiction – Whether there was risk of defendant's assets being dissipated before judgment – Material mispresentation by plaintiff

In this case the respondent had sued the appellant and another defendant for an alleged partnership debt for materials supplied and work done in respect of millworks on two floors of the Shangrila Inn, Penang under the terms of a sub-contract. On the date of the issue of the writ the respondent obtained ex parte a Mareva injunction against the appellant and the other defendant to restrain them from disposing or otherwise dealing with their assets not exceeding $95,000. The appellant applied to set aside the ex parte Mareva injunction. This was dismissed and the appellant appealed.

The principle issue on appeal was whether the discretionary power to issue the ex parte Mareva injunction had been properly exercised by the learned judge. It was argued (a) that the respondent's claim had nothing to do with the appellant but concerned only the other defendant; (b) that the learned judge erred in law and in fact in holding that there was a sufficient risk of the appellant's assets being dissipated before judgment.

Held, allowing the appeal:

(1) In applying for the Mareva injunction the respondent must satisfy the court firstly that he had a good arguable case; secondly that the appellant had assets within the jurisdiction and thirdly that there was a real risk of the assets being dissipated or removed before judgment in that there must be solid evidence to establish the risk.

(2) In this case on the pleadings and affidavit evidence, it could not be said that the learned judge was wrong in law or in fact in his findings that the respondent had established, in his own words, 'a good arguable claim' and had assets within jurisdiction.

(3) Mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant, who was not a party to the appeal, as presented before the learned judge, fell far too short of the necessary evidence to establish a real risk of dissipation of the assets of the appellant before judgment.

(4) Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosure of all material facts. Every material representation must not be misleading and there must not be any suppression of material acts. Failure to do so at the crucial time of making the ex parte application would invariably be fatal.

(5) In this case there was material misrepresentation made by the respondent and this was sufficiently grave to prevent the learned judge from exercising his discretion in the respondent's favour. The remaining representations made in support of the application were manifestly inadequate for the court to hold that there was a real risk of the appellant's assets being dissipated or removed before judgment.

Cases referred to

1 *Aspatra Sdn Bhd & 21 Ors* v *Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (folld)
2 *KSM Credit and Leasing Sdn Bhd* v *Data Mante (M) Sdn Bhd & Ors* [1986] 1 CLJ 500 (refd)
3 *Third Chandris Shipping Corporation & Ors* v *Unimarine SA* [1979] 2 All ER 972 (refd).

Appeal from: Civil Suit No 24-430-87 (High Court, Penang)

Cur Adv Vult

Darshan Singh Khaira for the appellant.
Balasundaram for the respondent.

Mohamed Azmi SCJ (delivering the judgment of the court): We allowed the appeal on 9 January 1989 and now give our reasons. The respondent (plaintiff) sued the appellant (first defendant) jointly and severally with Classy Homes Sdn Bhd (second defendant) for an alleged partnership debt of $82,062.68 for materials supplied and work done in respect of millworks on two floors of the Shangrila Inn, Penang, under the terms of a sub-contract. On 29 June 1987, the date of the issue of the writ, the respondent obtained by way of ex parte summons-in-chambers a Mareva injunction against both the defendants to restrain them until further order from disposing of or otherwise dealing with moneys or assets belonging to both or either of them not exceeding

$95,000, and from disposing of or otherwise dealing with the said assets or moneys due to them from the main contractor, Sumitomo Construction Co Ltd, to the extent of $95,000. By notice of motion dated 6 July 1987, the appellant applied to set aside the ex parte Mareva injunction and other consequential orders. The motion was heard on 4 January 1988 and was eventually dismissed on 22 February. Being dissatisfied, the appellant appealed with leave against the whole of the decision of the learned judge.

The principal issue before us was whether the discretionary power to issue the ex parte Mareva injunction had been properly exercised by the learned judge. Two grounds were canvassed on behalf of the appellant. Firstly, it was argued that the respondent's claim had nothing to do with the appellant but concerned only Classy Homes Sdn Bhd (second defendant). In its statement of defence dated 7 July 1987, the appellant denied that the respondent was its sub-contractor or its employee. It was averred that the appellant and the second defendant did jointly tender for the project at the hotel which was required by the main contractor to be done under one parcel, but the appellant separately carried out only the design part of the project. The appellant denied that it was at any time a partner of Classy Homes Sdn Bhd and therefore denied liability for the sum owed by the second defendant to the respondent. It was contended that in fact the second defendant still owed the appellant the sum of $14,386.46 which the second defendant had received from the main contractor. Clearly, the appellant's defence would be principally on the basis that the alleged debt due to the respondent was not a partnership debt but was incurred solely by the second defendant on the ground that the appellant was never a partner of the second defendant and as such it could not be held jointly and severally liable. There appeared to be no dispute to the appellant's contention that all moneys payable under the sub-contract were paid by the main contractor to the second defendant, and nor was there any challenge to the appellant's averment that money due to it already paid by the main contractor to the second defendant had not been paid. The issue on the existence of the alleged partnership between the appellant and the second defendant must of course be finally determined at the trial. But on the pleadings and affidavit evidence, it could not be said that the learned judge was wrong in law or in fact in his findings that the respondent had established, in his own words, 'a good arguable claim' and that the appellant had assets within the jurisdiction.

Secondly, it was argued that the learned judge erred in law and in fact in holding that there was a sufficient risk of the appellant's assets being dissipated before judgment. In the affidavit of Mr Wong Koi sworn on 29 June 1987 in support of the ex parte application for a Mareva injunction, he deposed in para 12 that:

> My solicitors have carried out a search at the Registrar of Companies on 26 June 1987 and have ascertained that the first defendant has only a paid-up capital of $60,000 and the second defendant has a paid-up capital of $50,000. The results of the search made are now shown to me and exhibited hereto marked 'WK-8'. Both companies do not appear to own any immovable properties.

It was not seriously disputed that the facts deposed in para 12, as far as the appellant was concerned, were untrue. The disclosure of these facts in the affidavit was obviously to prove not only that the appellant had insufficient fund or assets to meet the respondent's claim but also that in the circumstances there was a real risk that the said paid-up capital might be dissipated or removed before judgment. In response to these allegations, Mr Chew Teik Chye, the managing director of the appellant, in his affidavit-in-reply dated 17 July 1987, deposed in para 9 that:

> The plaintiff has misled the court. The first defendant's paid-up capital is $300,000. A copy of the statement is enclosed herewith marked as exhibit 'C-4'.

The learned judge dealt with this point on the basis that the matter complained of by the appellant was not a material fact but a mere misstatement. It was clear to us that whatever search or investigation carried out by the respondent's solicitors to ascertain the financial standing of the appellant was not done thoroughly or conscientiously. We were unable to agree with the learned judge that the attempt to depress the paid-up capital of the appellant from $300,000 to a mere $60,000 was not relevant or material in an ex parte application for a Mareva injunction. In our view, it must of necessity constitute a material misrepresentation of facts in that it purported to support the existence of a risk of the appellant's meagre assets of $60,000 being dissipated in the face of the anticipated judgment sum of $82,062.68.

The latest available consolidated balance sheet of the appellant as contained in exh C-4 clearly showed that it had been financially sound. It had a total current asset of $1.21m as compared to its total current liabilities of $870,845. The appellant's share capital was indeed $300,000.

The only other evidence available before the learned judge to arrive at a conclusion that there was a risk of dissipation of the appellant's assets was the fact that both the appellant and the second defendant had refused to settle the debt, and also the fact that in October 1986 a director of the second defendant had given the respondent a personal cheque of $3,000 towards part payment of the debt which cheque was dishonoured not apparently because of shortage of fund but for reason of payment being stopped.

In *Aspatra Sdn Bhd & 21 Ors* v *Bank Bumiputra Malaysia Bhd & Anor*[1] at p 100, this court by a majority had referred to the importance of the relief by way of a

Mareva injunction for the purpose of preserving assets and preventing a defendant from dissipating his assets within jurisdiction before judgment. But the remedy is not of unlimited application. On the facts of the appeal before us, the respondent must satisfy the court firstly, that he had a good arguable case; secondly, that the appellant had assets within jurisdiction, and thirdly, that there was a real risk of the assets being dissipated or removed before judgment in that there must be solid evidence to establish the risk. In our opinion, mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant (who was not a party in this appeal), as presented before the learned judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment.

Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the ex parte application would invariably be fatal. On this particular point we approve the judgment of VC George J in *KSM Credit & Leasing Sdn Bhd* v *Data Mante (M) Sdn Bhd & Ors*[2] on the applicability of the principle of frank and full disclosures in all ex parte applications for Mareva injunctions.

It is of utmost importance that the remedy of a Mareva injunction should not be abused. The caution for the benefit of the solicitors for the City of London given by Lord Denning MR in *Third Chandris Shipping Corporation & Ors* v *Unimarine SA*[3] (at p 985) had been quoted with approval in *Aspatra's* case at p 104, and we wish, with respect, to adopt the same caution for the benefit of the solicitors in this country.

In this appeal we were satisfied that the material misrepresentation made by the respondent was sufficiently grave to prevent the learned judge from exercising his discretion in the respondent's favour. The remaining representations made in support of the application were manifestly inadequate for the court to hold that there was a real risk of the appellant's assets being dissipated or removed before judgment. For these reasons we allowed the appeal with costs, and dissolved the Mareva injunction granted on 29 June 1987 as prayed for in the appellant's notice of motion.

Appeal allowed.

Solicitors: *Darshan Singh & Co*; *Balasundram & Co.*

Reported by *Prof Ahmad Ibrahim*

Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 502 OF 1987
LEE HUN HOE CJ (BORNEO), HARUN AND MOHAMED YUSOFF SCJJ
6 SEPTEMBER 1988 AND 10 MARCH 1989

Contract – Sale and purchase of land – Failure of purchaser to complete – Application for specific performance – Contract also providing for liquidated damages in default of payment – Discretion to grant specific performance – Specific Relief Act 1950, ss 11(2), 20(1)(a) & 21(2)(b).

Equity – Sale of immovable property – Claim for specific relief – Discretion of court – Specific Relief Act 1950, ss 11(2), 20(1)(a) & 21(2)(b)

In this case by an agreement the respondent agreed to sell and the appellant agreed to buy a piece of land in Kuala Lumpur for $15,110,700. The purchase price was to be paid by instalments. The appellant was to give vacant possession after payment of the purchase price in full. However, in order to facilitate development of the property, the respondent at the request of the appellant delivered the property to the respondent despite the fact that payment in full had not been made. The appellant had since demolished all the buildings on the land in order to prepare the land for development. The appellant subsequently failed to pay the last instalment and was given time to pay. The balance was later reduced to $4,500,00. The appellant indicated that he was unable to pay the balance and asked that the sums paid by them under the agreement be refunded subject to deduction of agreed liquidated damages not exceeding 25% of the purchase price, as provided in the agreement. The respondent replied requesting the appellant to complete the purchase and pointed out that the agreement specifically provided for the remedy of specific performance in the event of default by the purchasers to pay any part of the purchase money. The respondent sued the appellant for specific performance and the learned judge in the High Court made an order accordingly. The appellant appealed.

Held, dismissing the appeal:

(1) Specific performance is a discretionary remedy. Although s 20(1)(a) of the Specific Relief Act provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money, s 11(2) of the Act clearly says that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy.

(2) Under s 21(2)(b) of the Specific Relief Act the court may refuse to grant the relief of specific performance to the plaintiff if the granting of it would involve some hardship on the defendant which he did not foresee.

(3) In this case the court agreed with the learned trial judge when he said that hardship had been brought by the appellant himself when he decided to embark on the expensive venture without having secured adequate finance. The learned trial judge had exercised his discretion judicially and properly and there was no reason to interfere with the exercise of his discretion.

Cases referred to

1 *RM Venkatachalam Chettiar & Ors* v *NKR Arunasalam Chettiar* [1953] MLJ 234 (refd)